IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Michael R. Smolenski, Presiding Judge

AUTO-OWNERS INSURANCE COMPANY
Plaintiff-Appellant,

v

Docket No. 119403

AMOCO PRODUCTION COMPANY
Defendant-Appellee.
_____/

REPLY BRIEF ON APPEAL - APPELLEE

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WHETHER THE MEDICAL CARE COST CONTAINMENT RULES WHICH WERE PROMULGATED BY THE BUREAU OF WORKERS' DISABILITY COMPENSATION, 1988 AACS, R 418.101, et seq., LIMIT THE REIMBURSEMENT TO THE AUTO "NO-FAULT" CARRIER FROM THE EMPLOYER FOR THE COSTS OF THE MEDICAL CARE THAT THE EMPLOYEE NEEDED AFTER A PERSONAL INJURY BECAUSE OF WORK.

Plaintiff-appellant Auto-Owners Ins Co answers "No."

Defendant-appellee Amoco Production Co answers "Yes."

Amicus curiae ACIA answers "No."

Court of Appeals answered "Yes."

Workers' Compensation Appellate Comm answered "Yes."

Board of Magistrates answered "Yes."

COUNTER-STATEMENT OF FACTS

Leroy Smithingell (Employee) was absent from work between January 30 and May 16, 1994 (12b) and received medical care (10b, 11b) because of an injury to the left hand and back (10b) when knocked against an enclosed bulletin board on a wall (8b, 9b) by his truck left running in the garage at defendant-appellee Amoco Production Company (Employer). (8b) During this absence, the Employer continued to pay the salary of the Employee (13b)[1] and Metropolitan Life Insurance Company (Group Carrier) paid some of the expenses of medical care. (17b) Plaintiff-appellant Auto-Owners Insurance Company (Auto "No-Fault" Carrier) paid the Employee wage loss benefits[2] and paid for other medical care[3] because of the insurance the Employee had obtained. (14b)

The Auto "No-Fault" Carrier then filed an application for mediation or hearing with the Bureau of Workers' Disability Compensation (Bureau)[4] for repayment of the wage loss and medical expenses paid to the Employee from the Employer. (1b, 3b) The Employee did not seek or receive any workers' disability compensation.

The Board of Magistrates (Board) denied the claim for repayment of weekly compensation but allowed reimbursement for the costs of the medical care paid by the Auto "No-Fault" Carrier subject to cost containment and with ten percent interest. *Auto Owners Ins Co v Amoco Corp*, unpublished order and opinion of the Board of Magistrates, decided on May 30, 1995 (Docket no. 053095003). (18b, 22b)

The Workers' Compensation Appellate Commission (Commission) affirmed. *Smithingell v Amoco Production Co*, 1998 Mich ACO 1117. (23b, 26b-28b)

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[1] $787.00. (7b)

[2] $669.29 weekly (16b) for sixteen weeks (15b) totaling $10,708.64. (15b)

[3] Totaling $9,636.64. (15b)

[4] Now known as the Bureau of Workers' and Unemployment Compensation. Executive Order No. 2002-1.

The Court of Appeals remanded the case to the Commission for reconsideration in light of *Perez v State Farm Mutual Automobile Ins Co*, 418 Mich 634, 650; 344 NW2d 773 (1984), *Luth v Automobile Inter Ins Exchange*, 113 Mich App 289, 294; 317 NW2d 867 (1982), lv den 417 Mich 867 (1983), and MCL 418.852(1); MSA 17.237(852)(1). *Auto Owners Ins Co v Amoco Production Co*, unpublished order of the Court of Appeals, decided on November 6, 1998 (Docket no. 211679). (29b)

The Commission affirmed on remand. *Smithingell v Amoco Production Co (On Remand)*, 1999 Mich ACO 348. (30b, 33b-34b)

The Court of Appeals again remanded the case to the Commission to determine whether the cost containment rules promulgated by the Bureau limit reimbursement and, if not, establish the amount of reimbursement of the medical costs paid by the Auto "No-Fault" Carrier. *Auto Owners Ins Co v Amoco Production Co (After Remand)*, unpublished order of the Court of Appeals, decided on May 25, 1999 (Docket no. 218310). (35b) In the same order, the Court of Appeals expunged a brief which the Auto "No-Fault" Carrier had filed after the application for leave to appeal declaring that " . . . [the Auto 'No-Fault' Carrier] wrong[ly] noted that the amount of medical benefits paid . . . was $9,636.64. The total amount of medical benefits paid . . . [was] $19,191.81." *Plaintiff-Appellant Auto Owners Insurance Company's Supplemental Brief in support of* ***Application for Leave to Appeal***, 1 (Docket no. 211679). (35b)

The Commission affirmed on second remand. *Smithingell v Amoco Production Co (On Second Remand)*, 1999 Mich ACO 2914. (36b, 39b)

The Court of Appeals then granted leave to appeal from the decision by the Commission on second remand, *Auto Owners Ins Co v Amoco Production Co (After Second Remand)*, unpublished order of the Court of Appeals, decided on April 7, 2000 (Docket no. 223572) (40b), affirmed, *Auto Owners Ins Co v Amoco Production Co*, 245 Mich App 171; 628 NW2d 51 (2001) (41b-45b) and then, denied rehearing. *Auto*

Owners Ins Co v Amoco Production Co, unpublished order of the Court of Appeals, decided on May 17, 2001 (Docket no. 223572). (46b)

The Court granted leave to appeal which was requested by the Auto "No-Fault" Carrier, and the Employer. *Auto-Owners Ins Co v Amoco Production Co*, 466 Mich 859; - NW2d - (2002). (48b) After the Auto "No-Fault" Carrier filed a brief, *Brief of Appellant Auto-Owners Insurance Company*, and the Employer responded, *Brief on Appeal - Appellee*, amicus curiae Auto Club Insurance Association (Amicus Curiae) filed a brief amicus curiae which supported the arguments from the Auto "No-Fault" Carrier for reversing the opinion of the Court of Appeals. *Brief on Appeal - Amicus curiae Auto Club Insurance Association.*

SUMMARY OF ARGUMENT

The law about *who* may be paid is decidedly different from *what* may be paid.

ARGUMENT

I

THE MEDICAL CARE COST CONTAINMENT RULES WHICH WERE PROMULGATED BY THE BUREAU OF WORKERS' DISABILITY COMPENSATION, 1988 AACS R 418.101, et seq., LIMIT THE REIMBURSEMENT TO THE AUTO "NO-FAULT" CARRIER FROM THE EMPLOYER FOR THE COSTS OF THE MEDICAL CARE THAT THE EMPLOYEE NEEDED AFTER A PERSONAL INJURY BECAUSE OF WORK.

Amicus curiae presents the Court with *another* red herring. In particular, Amicus Curiae presents the Court with an argument that a statute in the Workers' Disability Compensation Act of 1969 (WDCA),[5] MCL 418.315(1); MSA 17.237(315)(1), ninth sentence, precludes the application of the medical care cost containment rules that were promulgated by the Bureau to limit the prices of medical care, 1988 AACS R 418.101, et seq., when an employer denies responsibility for compensation and is later ordered by the Board to pay for the medical care that was needed by an employee after a personal injury arising out of and in the course of employment. *Brief on Appeal - Amicus curiae Auto Club Insurance*

[5] MCL 418.101; MSA 17.237(101), et seq.

Association, Argument I, 9-10. This argument misdirects the Court from the real question in this case of whether an auto "no-fault" carrier is an *employee* within the rubric of the rules, 1988 AACS R 418.2102, by suggesting that none of the rules apply when the Board applies section 315(1), ninth sentence, to order an employer to reimburse an auto "no-fault" carrier for the payments of the medical care that was needed by an employee. The real question before the Court remains whether an auto "no-fault" carrier is an *employee* within the rubric of Rule 2102 because the medical care cost containment rules apply whether the reason for the payment of a medical bill was the recognition of the responsibility and voluntary payment by the employer or an order by the Board after a hearing occasioned by the employer denying responsibility.

There is nothing in the actual text of section 315(1), which describes medical care as one of the kinds of primary compensation for an injured employee, MCL 418.315(2); MSA 17.237(315)(2), which requires the Bureau to promulgate rules limiting the prices of medical care, or the medical care cost containment rules themselves that explicitly establish that these rules depend upon the reason for the payment of a bill for medical care by an employer. The statutes or rules would have to be changed to effect this by adding either an affirmative statement for application such as the rules apply *only when* an employer first recognizes the responsibility and proceeds with the voluntary payment of the medical care or an exclusion such as the rules apply *except when* an employer is ordered by the Board to pay the bill after a hearing occasioned by an initial denial of responsibility. The Court cannot effect this change. *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). *People v Pasha*, 466 Mich 378, 382; - NW2d - (2002).

The actual text of the statutes in the WDCA contradict any correlation between the amount of the reimbursement from an employer for medical care and the reason for the payment as a recognition of the responsibility and voluntary payment by the employer or a decree by the Board. Section 315(1), first sentence, directs an employer to recognize and

voluntarily pay the *reasonable* amount of the costs of medical care needed by an employee after a personal injury from work by stating that,

> "[t]he employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, *reasonable* medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed." (emphasis supplied)

Section 315(1), ninth sentence, allows the Board the authority to order an employer to pay the *reasonable* amount of the costs of medical care after a hearing should the employer deny responsibility by stating that, "[i]f the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the *reasonable* expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the [Board]."

This identical text in section 315(1), first sentence, and section 315(1), ninth sentence, which requires that an employer must pay the *reasonable* amount of the medical care needed by an injured employee certainly negatives the idea by Amicus Curiae that the extent of the responsibility of an employer depends upon the reason for the payment as a recognition and voluntary payment of a medical bill or an order to pay entered by the Board.

Section 315(2), first sentence, subordinates the *reasonable* amount of medical care in section 315(1) whether section 315(1), first sentence, or section 315(1), ninth sentence, to the price limits established by the medical care cost containment rules.

This is entirely consistent with the application of the price limits for all of the other primary compensation benefits available to an employee from an employer by the authority of the WDCA. As reported in the *Brief on Appeal - Appellee*, Argument I, 13-15, very particular statutes in the WDCA establish price limits for each of the other primary compensation benefits which are available from an employer such as weekly workers' disability compensation while an injured employee is disabled; medical and vocational rehabilitation; weekly workers' disability compensation for qualified survivors of an injured

employee who dies; and for the funeral and burial of an injured employee who dies after an injury from work. MCL 418.355(2); MSA 17.237(355)(2). MCL 418.321; MSA 17.237(321), first sentence. MCL 418.345; MSA 17.237(345), second sentence. All of these price limits apply whether an employer recognizes the responsibility and voluntarily pays or is ordered by the Board to pay a disputed primary compensation benefit. The Court should not distinguish the application of the price limits for the primary compensation benefit of medical care from the consistent application of identical price limits for all of the other primary compensation benefits. *Grand Rapids v Crocker*, 219 Mich 178, 182-184; 189 NW 221 (1922). *Wayne Co v Auditor General*, 250 Mich 227, 232-233; 229 NW 911 (1930). *Rathbun v State of Michigan*, 284 Mich 521, 543-545; 280 NW 35 (1938).

This is not to say that the WDCA fails to establish rules which depend on the reason for the payment of primary compensation benefits by an employer. It does. As reported in the *Brief on Appeal - Appellee*, Argument I, 11-13, there are no fewer than four statutes in the WDCA which establish rules which depend upon the reason for the payment of primary compensation benefits by an employer.

One statute in the WDCA that establishes a rule which applies depending upon the reason for the payment of primary compensation benefits is MCL 418.831; MSA 17.237(831). Section 831 establishes the rule of evidence in a contested claim for workers' disability compensation that a prior recognition and voluntary payment of primary compensation benefits is not an admission of the actual liability by stating that, "[n]either the payment of compensation or [sic, nor] the accepting of the same by the employee or his dependents shall be considered as a determination of the rights of the parties under this act."

The other statutes in the WDCA that establish a rule which applies depending upon the reason for the payment of primary compensation benefits are MCL 418.801(2), (3) and (6); MSA 17.237(801)(2), (3) and (6). These three statutes describe ancillary compensation benefits which are available only because the reason for the payment

of a particular primary compensation benefit is a final order by the Board after a hearing when the employer did not initially recognize and voluntarily pay the benefit.

Section 801(2), first sentence, and section 801(3), first sentence, provide an ancillary benefit of a late payment penalty when the reason for the responsibility for the primary compensation benefit of weekly workers' disability compensation or medical care is a final order of the Board stating that,

> "[i]f weekly compensation benefits or accrued weekly benefits are not paid within 30 days after becoming due and payable, in cases where there is not an ongoing dispute, $50.00 per day shall be added and paid to the worker for each day over 30 days in which the benefits are not paid."

and

> "[i]f medical bills or travel allowance are not paid within 30 days after the carrier has received notice of nonpayment by certified mail, in cases where there is no ongoing dispute, $50.00 or the amount of the bill due, whichever is less, shall be added and paid to the worker for each day over 30 days in which the medical bills or travel allowance are not paid."

Courts have always required an order of the Board establishing the responsibility for the particular primary compensation benefit of weekly workers' disability compensation or medical care before imposing a penalty. *Charpentier v Canteen Corp*, 105 Mich 700; 307 NW2d 704 (1981). *Clark v General Motors Corp, Chevrolet Assembly Plant*, 117 Mich App 387; 323 NW2d 714 (1982). *Couture v General Motors Corp*, 125 Mich App 174; 335 NW2d 668 (1983). *Morley v General Motors Corp*, - Mich App - ; - NW2d - (Docket nos. 233923, 233929, rel'd July 19, 2002). No case has allowed assessing a penalty without some order of the Board establishing the particular primary compensation benefit to be paid whether a formal order and opinion, *Charpentier, supra*, or memorializing and ratifying an agreement of the parties to end a contested claim. *Clark, supra*. *Morley, supra*.

Section 801(6) provides an ancillary compensation benefit of interest only when the reason for the responsibility of the employer for the payment of the primary compensation benefit of weekly workers' disability compensation is an order of the Board

by stating that, "[w]hen weekly compensation is paid pursuant to *an award of [the Board]* . . . interest on the compensation shall be paid at the rate of 10% per annum from the date each payment was due, until paid." (emphasis supplied)

Plainly, these four statutes in the WDCA represent a cohesive scheme of both incentives and sanctions which actually apply depending upon whether an employer recognizes and voluntarily pays one or another primary compensation benefit or is ordered by the Board after denying responsibility. The price limits for the primary compensation benefits are *not* a part of this scheme. The Court cannot change this regardless of the better clarity or improved effectiveness of a scheme which does include the price limits for primary compensation by either allowing application of the price limits with the prompt recognition of responsibility and voluntary payment by an employer or prohibiting application of the price limits when the Board orders primary compensation after the employer denied responsibility as suggested by Amicus Curiae. The Court may not interpose its views on the preference of one scheme over another when the Legislature has established the scheme it thinks best. *Crane v Reeder*, 22 Mich 322, 340-341 (1871). *Lawrence Baking Co v Unemployment Compensation Comm*, 308 Mich 198, 215-216; 13 NW2d 260 (1944). *Robertson, supra*, 758, 759.

In the case of *Crane, supra*, 340-341, Justice Christiancy said for the Court that,

> ". . . these are considerations of policy appealing to the good sense of the legislature, and bearing as well upon the question of a *proper statute of limitations, as upon the mode of sale. All questions of this kind the legislature have a right to decide, while the courts have none.
>
> It might have been more judicious for the state officers, though the statute did not require it, after the escheat was brought to their attention, to have offered the lands at public sale. But this is equally a question of policy or discretion which was within their jurisdiction to decide, and which we have no power or inclination to review."

In the more contemporary case of *Robertson, supra*, 758, 759, Justice Markman said for the Court the very same,

> ". . . it is the constitutional duty of this Court to interpret the words of the lawmaker, in this case the Legislature, and *not* to substitute our own policy preferences in order to make the law less 'illogical'.
>
> * * *
>
> . . . our judicial role 'precludes imposing different policy choices than those selected by the Legislature . . . .' [citation omitted]." (emphasis by the Court)

Section 315(1), ninth sentence, serves a completely different purpose than establishing *what* is the responsibility of an employer for a particular primary compensation benefit as the price limits of the medical care cost containment rules. The purpose of section 315(1), ninth sentence, is to describe *who* shall be paid when the employer is responsible. By its own terms, section 315(1), ninth sentence, allows the Board to direct the employer to pay the injured employee *or* anyone else having an unpaid bill, "[i]f the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the [Board]."

This is plain from the grammar of section 315(1), ninth sentence. Section 315(1), ninth sentence, is indeed a sentence because it has a subject, a verb, and an object. The subject is the noun *the employer*, the verb which is the action by the *the employer* is the past tense action verb *reimbursed*, and the object which is the recipient of the action by *the employer* is *the employee* or *persons to whom the unpaid expenses may be owing*. The remainder of the sentence only includes subordinate clauses to explain the kind of reimbursement required which is *the reasonable expense paid* and when that may occur which is *fails, neglects, or refuses so to do* and *by order of the [Board]*.

The object of section 315(1), ninth sentence, is exactly why an employee, a hospital, a doctor, a pharmacist, a group disability insurance carrier, and even an auto "no-fault" carrier must seek and receive benefits even though none of these people pursue reimbursement. Indeed, it is section 315(1), ninth sentence, that allowed the

Auto "No-Fault" Carrier to file and prosecute the *Application for mediation or hearing* before the Board without the consent or participation of the Employee. Cf *Russell v Welcor, Inc*, 157 Mich App 351; 403 NW2d 133 (1987), lv den 429 Mich 860; 412 NW2d 653 (1987).

Section 315(1), ninth sentence, is just like section 345, third and fourth sentences. Section 345, third sentence, describes *who* may be paid the cost of a funeral and burial of an employee who died because of a personal injury from work by stating that, "[a]ny person who performed such service or incurred such liability may file an application with the bureau." Section 345, fourth sentence, authorizes the Board to order the payment by stating that, "[the Board] may order the employer to pay such sums."

While section 345, third and fourth sentences, concern *who* to pay, section 345, third and fourth sentences, do not concern *what* to pay. *What* an employer must pay for the funeral and burial is a different issue and not too surprisingly, addressed by a different statute which establishes a price limit by stating that, "[t]he cost of the funeral and burial shall not exceed $6,000.00 or the actual cost, whichever is less."

Just as section 315(1), ninth sentence, is like section 345, third and fourth sentences, by addressing *who* may be paid, the medical care cost containment rules are like section 345, *second* sentence, by separately addressing *what* may be paid. There is no context by which to tie-bar *who* may be paid with *what* may be paid.

Finally, section 315(1), ninth sentence, confirms the answer by the Employer to the real question before the Court of whether an auto "no-fault" carrier is an *employee* within the rubric of Rule 2102. Section 315(1), ninth sentence, reflects that only the individual human being who was hurt because of work is the *employee* by explicitly distinguishing that person from other *persons to whom the unpaid expenses may be owing.* The explicit distinction is from the word *or* in the object phrase of section 315(1), ninth sentence, which is *the employee shall be reimbursed for the reasonable expense paid by the employee,* ***or*** *payment may be made in behalf of the employee to persons to whom the*

unpaid expense may be owing. In section 315(1), ninth sentence, the word *or* is disjunctive by describing two different people who constitute the object of the sentence. The word *or* is disjunctive. *American Fidelity Co v RL Ginsburg Sons' Co*, 187 Mich 264, 276; 153 NW 709 (1915). *Sun Valley Foods Co v Ward*, 460 Mich 230, 237, n 6; 596 NW2d 119 (1999). In the case of *American Fidelity Co, supra*, 276, the Court held that,

> "'[o]r' and 'otherwise,' in the connection used, have substantially the same meaning (suggesting 'on the other hand'), and their joint use, strictly speaking, only amounts to emphasizing by redundance the thought conveyed. They serve to so disjunctively co-ordinate the two propositions that each in turn excludes the other."

There would be no need for the object phrase *persons to whom the unpaid expense may be owing* were the object phrase *the employee* broad enough to include the Auto "No-Fault" Carrier.

RELIEF

Wherefore, defendant-appellee Amoco Production Company prays that the Supreme Court affirm the opinion of the Court of Appeals.

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